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In the Supreme Court of the the United States

(OCTOBER TERM 1943)

No. 249

THE EVANGELICAL LUTHERN SYNOD OF KANSAS AND ADJACENT STATES, a corporation,
Petitioner,

VERSUS

FIRST ENGLISH LUTHERN CHURCH OF OKLAHOMA CITY, a corporation; FRED H. BLOCH, as Pastor Pretendent of Such Church; and E. C. DOERR, J. H. WINNEBERGER, ALBERT SWANSON, STANLEY HAMER, WALTER QUICK, A. E. ROSENTHAL, V. H. SMITH and S. C. HOSHOUR, as Members of the Board of Deacons and Trustees,
Respondents.

REPLY BRIEF OF PETITIONER

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September, 1943.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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The respondents in their brief opposing the issuance of the writ of certiorari admit that the Kansas Synod has some power over the City Church. They say to determine the extent of that power we must look to the constitution of the Kansas Synod and the City Church. They admit that those provisions found on pages 37 and 38 of the Record are parts of the constitution of the Kansas Synod, so it is conceded that these provisions are binding upon the

City Church. The first provision, in the order in which they are found in the Record, is Article One, Section 3, paragraph 4 (R. 37), which provides:

> "Every congregation shall be faithful to its obligations to this (Kansas) Synod in all matters of support, practice and church government."

No construction of this provision is necessary, it simply means what it says. Article Six, Section 2, paragraph 3 (R. 37) provides:

> "Contemplated changes of its (the local church's) constitution, affecting its articles of faith, *adherence to the Synod and the United Lutheran Church in America, and disposition of its property,* shall be reported to the President (of Synod) for his approval." (Italics ours).

Nothing can be plainer than this language. By it the Synod is given power to supervise and control the City Church, not only in its method of worship, but it cannot sever its membership with the Synod nor dispose of its property without the approval and consent of the President of the Synod.

Article Eight, Section 2, paragraph 1 (R. 37) provides:

> "Every congregation belonging to the Synod, as it has a share in all its acts and supervisions, *shall comply with the Constitution, By-laws, decisions and recommendations of the Synod,* and Local Conference and conform to its public worship and ministrations to the order used by the United Lutheran Church in America and approved by the Synod." (Italics ours)

This provision unequivocally gives the Synod full and complete control over the congregation.

Article Eight, Section 2 (R. 37) provides:

"In cases of vacancy, difficulty or strife in a congregation, the church council *shall seek the advice and instruction of the President of Synod.*" (Italics ours).

and in Article Eight, Section 4 (R. 37-38) it is provided:

"In case of strife and division, should any part of a congregation or pastorate belonging to the Synod reject the faith as set forth in Article One, Section II, *or revolt against the constitutional provisions, or its obligations as a member of the Synod,* that part of the congregation or pastorate, whether majority or minority of its membership, which continues in unity with the Synod and its faith shall be recognized as the lawful congregation or pastorate." (Italics ours).

Plainly it was the purpose of the framers of the constitution of the Kansas Synod, as shown by the last two provisions above quoted, to keep harmony in the local congregation, but in the event this could not be done, then that part of the congregation, whether majority or minority of the membership shall be the lawful congregation. Why is this provisions? Obviously, so that there shall always be a local congregation in membership with the Synod.

We submit that under these provisions of the constitution of the Kansas Synod, it has complete jurisdiction and control over the City Church.

Respondents say that the stipulation contained in the Record, that the property is owned by the City Church, bars the Kansas Synod from claiming any interest therein. But as heretofore shown, that ownership is for the benefit of all of the members of the United Lutheran Church in

America, and the right to control it is regulated by the organic law of that church through the judicatories established for the government of the church.

The contention that the government within the Presbyterian Church in the United States of America is different from that existing within the United Lutheran Church in America is untenable. No attempt is made by respondents to point out the distinction, other than say that one is governed from the "top down" and the other is governed from the "bottom up." We sumbit that the forms of government existing in the Presbyterian Church in the United States of America and the United Lutheran Church in America, are both representative and republican. The judicatories in the Presbyterian Church in ascending order are: the Session, the Presbytery, the Synod and the General Assembly. The corresponding judicatories within the United Lutheran Church in America are: the Council, the Conference, the Synod and the General Synod.

Respondents contend that *Watson* v. *Jones,* 13 Wall 679, 20 L. ed. 666, being a Presbyterian case, is not authority here that the City Church is under the government and control of the Kansas Synod and bound by its orders and judgments. But they overlook Article Eight, Section 2, paragraph 1 of the Constitution of the Kansas Synod, *supra,* which was accepted by the City Church, wherein it is specifically provided that it "shall comply with the constitution, by-laws, decisions and recommendations of the Synod."

It is argued that *Purcell et al.* v. *Summers et al.,* 126

Fed. (2d) 421, is not authority here. That action was brought by eight Bishops of the unified Methodist Church for the benefit of the church, against the South Carolina Conference of the Methodist Episcopal Church, South, for a declaratory judgment finding that the unified church had succeeded to the property and rights of the Methodist Episcopal Church, South. The defense in that case, as here, was that no property rights were involved, as all of the property within the South Carolina Conference was owned by various boards, trustees, commissions and corporations, but the Court held that the *beneficial use of the properties was in the general church organization and subject to its right of control.*

Nagle et al. v. *Miller et al.*, decided by the Supreme Court of Pennsylvania in 1922, 188 Atl. 670, and cited in our original brief, involved an action by one faction of a congregation to recover possession of the Evangelical Lutheran Church of the Holy Communion of Harrisburg. Upon its organization, it became affiliated with the Evangelical Lutheran Ministerium of Pennsylvania and Adjacent States, a synod of the General Council of the Evangelical Lutheran Church in America. It purchased property, and built a church building, receiving financial aid from the conference and ministerium and Board of Missions of the General Council of the Evangelical Lutheran Church in North America. In 1905 it was incorporated. In 1918 the General Council of the Evangelical Lutheran Church in North America merged with the General Synod of the Evangelical Lutheran Church of the United States, (formerly the general synod of the Kansas Synod), and the Evangelical

Lutheran Church of the United Synod in the South, to form *the United Lutheran Church in America.* Part of the congregation of the Harrisburg church opposed the merger and at a congregational meeting a majority of its members voted to withdraw from the Ministerium and conference, and excluded the minority of the congregation which favored the merger, from the church. The minority thereupon brought suit to have the action of the majority in withdrawing the church declared illegal and an unlawful diversion of the church property. The action was defended on the ground that the Harrisburg church was not bound by the course adopted by the general Council in forming the union with other synods under the name of the United Lutheran Church in America. The Court passing on the question of the power of the synod over the congregation said, as stated in the syllabus:

> "A Lutheran Church, organized as a mission under the supervisions of the Lancaster Ministerium through its agent, a conference, and subsequently admitted into the Ministerium and conference and afterwards incorporated for the purpose of public worship according to the faith, doctrine, discipline and usages of the Evangelical Lutheran Church as interpreted and promulgated by the General Council of the Evangelical Lutheran Church in North America, held, an associated church in union with the Ministerium, Conference and General Council and subject to the order and discipline of the denomination and synod to which it belonged and not authorized to divert its property from the purposes of that organization."

This case is referred to as it gives an historical background of the formation of the United Lutheran Church in Amer-

ica, and because it unqualifiedly holds that the congregation is subordinate to the synod and subject to its orders and judgments.

In *First English Evangelical Lutheran Church of Los Angeles et al.* v. *Disinger et al.*, decided by the District Court of Appeal of California, in 1931, hearing denied by the Supreme Court of California in 1932, 6 Pac. (2d) 522, there was involved a dispute over possession of Lutheran Church property. The attempt there to divert the property was by amending the constitution of the local church in order to make it independent. The District Synod decided that such action could not be taken by the local congregation, and held that the loyal members of the congregation were entitled to the property. The Court said as stated in the syllabus:

> "Determination of district synod, of which plaintiff church was member, of conflicting claims to church property in favor of plaintiff church, held conclusive."

This case is referred to not only to show that the synod has power of supervision and control over the congregation, but also that its finding and decisions are binding upon the courts.

The respondents argue that no grounds for *certiorari* exist. As stated in our original brief the opinion of the Circuit Court of Appeals, holds that the City Church is independent and free from control of the Kansas Synod in the use of its property. That the Kansas Synod has no beneficial interest therein, and that the City Church is under no enforceable obligation to make payments to the

Kansas Synod. It held that the Kansas Synod could not maintain an action against respondents, and dismissed the action. If this judgment is allowed to stand, and unless this Court grants *certiorari*, it forever closes the door on the Kansas Synod enforcing its judgments and orders as a superior ecclesiastical judicatory against the City Church. If the loyal faction of the congregation of the City Church attempts to bring an action against respondents in the state court for possession of the church property, to which it is entitled under the order and decision of the Kansas Synod, it will be met at the outset by the complete defense that the Circuit Court of Appeals has adjudicated that the Kansas Synod has no control whatsoever over the City Church, and the entire organization of the Kansas Synod shall be completely destroyed.

Because of the opinion of the Circuit Court of Appeal, in which it assumed upon its own motion, that the City Church was independent, the Kansas Synod, although it has exercised all of its powers as a superior ecclesiastical judicatory, over the City Church, which powers are plainly given it by the organic law of the church, in its attempt to enforce its judgment in the civil court, which judgment should be binding and conclusive upon the civil court, not only is denied relief, but is adjudged by the civil court to have no power whatsoever over the City Church. That although its constitutional powers over the congregation are admitted by respondents, they are in possession of the church property under a minister who has been suspended by the Kansas Synod, in open defiance to the Synod, and it

is powerless, in spite of the power admittedly given it, to do anything about it.

We submit therefore *certiorari* should be granted by this Court for the following reasons:

1. The judgment of the Circuit Court of Appeals will result in a miscarriage of justice.

2. The judgment of the Circuit Court of Appeals is contrary to the settled law as handed down by this Court in *Watson* v. *Jones, supra,* and *Barkley et al.* v. *Hayes et al.,* 208 Fed. 319, affirmed in *Shepard et al.* v. *Barkley et al.,* 247 U. S. 1.

Respectfully submitted,

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September, 1943.

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